IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 7 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE KUNDAN SINGH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

==========

PRADIP J MEHTA

Versus

COMMISSIONER OF INCOME TAX

Appearance:

MR R.K. PATEL, Advocate for the Assessee

MR BB NAIK, Standing Counsel for the Revenue

CORAM : MR.JUSTICE R.K.ABICHANDANI
and

MR.JUSTICE KUNDAN SINGH

Date of decision: 03/05/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The Income Tax Appellate Tribunal, Ahmedabad Branch `A' has referred under section 256(1) of the Income Tax Act, 1961 the following questions for the opinion of this High Court :

"[1] Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the status of the assessee for the year in question was not that of `Resident but not ordinarily resident' as claimed by him?

[2] Whether the Tribunal has erred in law in interpreting provisions of section 6 of the Act while holding that the assessee's case did not fall within the purview of section 6(6) of the Act as claimed by him in view of undisputed position of his status in relation to preceding ten years? "

1.1 The Income Tax Officer found that the assessee had resided in India in the last nine previous years for the number of days shown below :

Sr.No.	Financial Year	Stay in India
(1)	1980-81	91
(2)	1979-80	62
(3)	1978-79	272
(4)	1977-78	50
(5)	1976-77	197
(6)	1975-76	365
(7)	1974-75	365
(8)	1973-74	365
(9)	1972-73	365

2. The Income Tax Officer observed that, in view of the provisions of section 6(6) of the said Act, the assessee was required to fulfill either of following two conditions to claim the status of of `not ordinarily

resident' :-

(1) in nine out of ten previous years, he should not be resident in India, or

(2) he should not have stayed in India for a period of seven hundred thirty days or more during the last seven previous years.

It was noted that, during the last nine previous years, the assessee was non-resident for only three years and during the last seven previous years, he had stayed in India for a period of 1402 days. It was, therefore, held that the status claimed by the assessee of `not ordinarily resident' was not acceptable. During the previous year under consideration, the assessee stayed in India for a period of 196 days i.e. more than 182 days and therefore, his status was as a resident in India under section 6(1)(a) of the said Act. It was, therefore, held that the income earned outside India by the assessee in that previous year was includible in his total income.

3. In the appeal preferred by the assessee before the Commissioner of Income Tax (Appeals) IV, Ahmedabad, the Commissioner (Appeals) by his order dated 13th August 1985 came to a finding that since the assessee who was a citizen of India rendering service outside India was in India for less than ninety days during the financial years 1979-80 and 1976-77, he was not resident in India in nine years out of ten years and therefore, his status was correctly taken by the Income Tax Officer as resident in India. The appellate authority, therefore, on the substantial aspect of the matter, confirmed the order of the Income Tax Officer while partly allowing the appeal in respect of exchange rate of interest, by directing the Income Tax Officer to take official exchange rate of dollars into rupees as per the Reserve Bank of India Bulletin and to re-calculate interest under section 217, if necessary.

4. The matter was carried by the assessee to the Income Tax Appellate Tribunal and the Appellate Tribunal, by its order dated 24th July 1987, dismissed the appeal holding that the assessee was correctly assessed in the status of resident and the order of the C.I.T. (Appeals) did not call for any interference. Considering the number of days of his stay in India in the preceding nine years, the Tribunal noted that he had been in India for sixty-two days in 1979-80 and fifty days in 1977-78 and therefore, he cannot claim that he had not been resident

in India in nine out of ten previous years preceding the year under consideration under the first part of section 6(6)(a). As regards the second part of section 6(6)(a) of the Act, the Tribunal noted that the period of stay of the assessee in India during the last seven previous years preceding the year under consideration much exceeded seven hundred thirty days, and therefore, his case was not covered even by the second part. It was accordingly held that since the assessee did not satisfy the condition of his being treated as `not ordinarily resident' in India, he could not have been assessed as `resident but not ordinarily resident' and was, therefore, rightly assessed in the status of ordinary resident.

5. It was contended by the learned counsel appearing for the assessee that the intention of the legislature in enacting the provisions of section 6(6)(a) of the Act was that if the individual was not a resident in nine out of ten previous years, or during preceding seven years, or he had been in India for more than seven hundred thirty days, he should be treated as `not ordinarily resident' in India. It was argued that, in the present case, the assessee had not been resident in India for two years out of ten preceding years and therefore, he was resident in India in eight years out of ten preceding years, which means he was not a resident in India in nine out of ten preceding years. Since the assessee was not a resident in India in nine out of ten years but only eight out of ten years, he, according to the learned counsel, fell in the category of `not ordinarily resident' in India.

6. In support of his contentions, the learned counsel referred to the following decisions :-

[a] The decision of the Patna High Court in C.T. Townsend v. Commissioner of Income Tax, Bihar, reported in 97 ITR 185 was cited for the proposition that, if any of the conditions mentioned in clauses (a), (b) or (c) of section 6(1) of the said Act is fulfilled, the assessee will be a `resident' within the meaning of the Act and if he comes within the mischief of either of the two conditions mentioned in section 6(6)(a), he will be treated as `not ordinarily resident'. In that case, the assessee came to India in April 1964, and continued to stay in India till the end of March 1965, and therefore, it was held that he clearly fulfilled the condition laid down in sub-section (6)(1)(a) of the said Act and as such, was a `resident in India' during the previous year in question. It

was held that the assessee, however, could not be treated as `ordinarily resident' in India as he fell within the first condition in section 6(6)(a) namely, that he was not resident in India in nine out of ten previous years preceding the year 1964-65 even though he did not come within the mischief of the second condition.

[b] The Advance Ruling by the Authority for Advance Rulings, reported in 223 ITR 1997 (Advance Ruling A. No.P-5 of 1995, In re.) was cited to point out that the said Authority while construing the meaning of the expression `resident but not ordinarily resident', held that the correct construction of section 6(6)(a) of the said Act was that a person would become ordinarily resident only if (a) he has been `resident' in nine out of ten preceding previous years; and (b) has been in India for at least 730 days in the seven preceding previous years and that he will be treated as resident but not ordinarily resident if either of these conditions is not fulfilled.

[c] The decision of the Bombay High Court in Manibhai S. Patel v. Commissioner of Income Tax, reported in 23 ITR 27 was cited for the proposition that, in order that an individual is `not ordinarily resident' in the taxable territories, he should satisfy one of the two conditions laid down in section 4B(a) of the Indian Income Tax Act, 1922 (which corresponded to section 6(6)(a) of the Act of 1961). It was held that, under section 4B(a), what was required to be considered was the assessee's residence in the `taxable territories' and not his residence outside the `taxable territories'. If the assessee had been in the `taxable territories' for more than two years in the preceding seven years, then he does not satisfy the second condition laid down in section 4B(a) and would, therefore, not be `not ordinarily resident' in the taxable territories. In that case, the assessee was living in Africa for four years out of the preceding seven years and he was in the `taxable territories' for about three years and the question was whether he was `not ordinarily resident' in `taxable territories' under the second part of section 4B(a) and it was held that, he did not satisfy the second condition.

[d] The decision of the Travancore - Cochin High Court in P.B.I. Bava v. Commissioner of Income Tax, reported in 27 ITR 463 was cited to point out that, in context of section 4B(a) of the Indian Income Tax Act, 1922, the High Court had held that a person was not ordinarily resident in any year unless he satisfies both of the conditions of the said provision which make a person ordinarily resident, namely, (i) the condition that he must have been resident in nine out of ten years preceding that year, and (ii) the condition that he must have been here for periods of more than two years during the seven years preceding that year. It was held that a person is `not ordinarily resident' in India in the previous year if he has not been `resident' in nine out of the ten years preceding that year; he need not establish that he was `not resident' in nine out of the ten years. It was observed that `not resident' and `not ordinarily resident' are not positive concepts but only the converse of `resident' and `ordinarily resident' and a category of persons `not resident and not ordinarily resident' is impossible to imagine and unknown to the Act.

6.1 The learned counsel also relied upon the following observations from Kanga and Palkhivala's The Law And Practice of Income Tax, Seventh Edition, Volume I, page 192 :-

"In order to claim the status of being `not ordinarily resident' under the first part of this clause, residence in India for less than nine years out of the preceding ten years is sufficient. (The learned Author here refers in foot-note the decision of Marimuthu Pillai v. CIT, reported in 13 ITR 186, 188; Swaminathan Chettiar v. CIT, reported in 15 ITR 418, 424 and Bava v. CIT, reported in 27 ITR 463). The result, broadly speaking, is that (a) a new-comer to India would remain `not ordinarily resident' for the first nine years of his stay here, and (b) an ordinary resident of India who goes abroad and remains non-resident for two years would, upon his return, be treated as `not ordinarily resident' for the next nine years."

7. The learned standing counsel appearing for the Revenue supporting the reasoning of the Tribunal, argued that sub-section (6)(a) of section 6 defines the expression `not ordinarily resident in India' and lays

down a criteria on the basis of which an assessee can be treated as `not ordinarily resident in India'. It was argued that the said provision was not meant to lay down any criteria for deciding as to who are `ordinarily resident in India'. For ascertaining as to who is a resident in India, criteria is laid down in section 6(1) for individual, section 6(2) for H.U.F., section 6(3) for Company and section 6(4) for other persons. Therefore, the provisions of section 6(6) are required to be looked at only from the angle that they define who is `not ordinarily resident in India'. It was contended that the condition in first part of section 6(6)(a) of the Act required an individual not to be resident in India for nine years in the preceding ten years in order to qualify for being treated as `not ordinarily resident in India'.

8. Ordinarily, a question whether a person is or is not a resident in India, is a question of fact for the decision of the Appellate Tribunal. When such question is referred to the High Court, it may be assumed that the opinion is sought as to whether, in context of the facts found, the assessee is `not ordinarily resident' in India or `resident'.

9. Section 6 entitled `Residence in India' corresponds to section 4A of the Act of 1922 which defined `residence in the taxable territories' for the purposes of that Act. Section 4B of the Act of 1922 entitled `ordinary residents' was inserted by the Income Tax Amendment Act, 1939 and corresponded to sub-section (6) of section 6 of the said Act. Sub-section (6) of section 6 of the Act of 1961, as it operated at the relevant time and which falls for our consideration, reads as under:-

"6(6) A person is said to be `not ordinarily resident' in India in any previous year if such person is -

[a] an individual who has not been resident in India in nine out of the ten previous years preceding that year, or has not during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and thirty days or more; or

[b] xxxxx "

10. Section 6(1) of the said Act provided at the relevant time three separate grounds in clauses (a), (b) and (c), on any one of which, an individual could be said to be resident in India. An individual who is in India

in any previous year for a total period of one hundred and eighty-two days or more during the relevant previous year will be considered to be resident in India in that previous year for the purposes of the said Act, as provided by section 6(1)(a) of the Act.

10.1 Clause (b) of section 6(1) provided a twin condition of maintaining a dwelling house for one hundred and eighty-two days or more days and being in India for thirty days or more in the relevant previous year. This clause which was in force during the assessment year under consideration, was deleted with effect from 1-4-1983.

10.2 Under clause (c) of section 6(1), if an individual has been for a total period of three hundred sixty five days or more in four years preceding the previous year in India and has been for sixty or more days in India during the previous year, would for the purposes of the Act be said to be resident in India in that previous year. Explanation to clause (c) substitutes words one hundred eighty two days for sixty days in case where a citizen leaves India in any previous year for the purpose of employment and ninety days in the case of a citizen who being outside India comes on a visit to India in any previous year.

11. In order that an individual is `not ordinarily resident' in India, what is required to be considered is the length of his residence in India as defined, and if an individual is resident in India in such number of years which does not make him not being such resident in nine out of ten preceding years or has been in India for seven hundred and thirty or more days during the preceding seven years, then he is not a `not ordinarily resident' in India and the benefit of the exemption to which a `not ordinarily resident' would be entitled to claim under section 5(1)(c) of the Act would not be available to him. Under section 5(1)(c), in case of a person who is `not ordinarily resident' in India within the meaning of sub-section (6) of section 6, the income which accrued or arises to him outside India, shall not be included in his total income of the previous year in which he is `not ordinarily resident' in India, unless it is derived from a business controlled in or a profession set up in India.

12. The short contention raised for the assessee was that section 6(6)(a) was applicable to this assessee who must be treated to be `not ordinarily resident' in India, because, he was resident in India in eight out of ten

years preceding the previous year 1981-82 and not nine out of ten years. In other words, he would be an individual who is `not ordinarily resident' in India even if for all the remaining eight years he is a resident in India within the meaning of section 6(1) of the Act. Only if the assessee has been resident in India for nine out of ten years, he will be ordinarily resident in India, otherwise he will be `not ordinarily resident' in India. This contention though appearing to be attractive at first blush, is not at all warranted by the provisions of section 6(6)(a) of the Act. Section 6(6) does not define `ordinarily resident in India', but describes `not ordinarily resident' in India. It resorts to the concept of `resident in India' for which criteria is laid down in section 6(1) of the Act. On its plain construction clause (a) of section 6(6) would mean that if an individual has in all the nine out of ten previous years preceding the relevant previous year not been resident in India as contemplated by section 6(1), he is a person who is `not ordinarily resident' in India. To say that an individual who has been resident in India for eight years out of ten preceding years should be treated as `not ordinarily resident' in India, does not stand to reason and such contention flies in the face of the clear provision of clause (a) of section 6(6) which contemplates the period of nine years out of ten preceding years of not being a resident in India before an individual could be said to be `not ordinarily resident' in India, which position will entitle such person to claim exemption under section 5(1)(c) of the Act in respect of his foreign income. An individual who has not been resident in India, within the meaning of section 6(1), for less than nine out of ten preceding years does not satisfy that statutory criteria laid down for treating such individual as a person who can be said to be `not ordinarily resident' in India, as defined by section 6(6). A resident of India who goes abroad and is not a resident in India for two years during the preceding period of ten years will therefore not satisfy the said condition of not being a resident of India for nine out of ten years.

13. The second part of clause (a) of sub-section (6) of section 6 throws light on the interpretation of the first part. Under the second part, an individual is said to be `not ordinarily resident' for the purposes of the Act if he has not been in India for a period of seven hundred thirty days or more during the seven years preceding the relevant previous year. That means, if an individual has been in India for seven hundred thirty or more days during that period, he will not be said to be

`not ordinarily resident' in India. In other words, for days which make up five years out of the preceding seven years, he should not have been in India for satisfying the second condition. If during the preceding seven years, individual is in India seven hundred thirty or more days, he is not included in the category of `not ordinarily resident' irrespective of the period during those seven years in which he has been outside the country as held by the Madras High Court in Sri K.M.N.N. Swaminathan Chettiar v. Commissioner of Income Tax, reported in AIR (35) 1948 Madras 189. In the concurring judgement, Patanjali Sastri J. vividly illustrated the matter by observing as under :-

"A person by adopting the simple expedient of being absent say, in a neighbouring Indian State for 3.1/2 months every year during the seven years period referred to in the section, could relieve himself of his status as an `ordinary resident', however close in quality and preponderating in duration his connection with British India may be. This, it seems to me, could not have been intended by the Legislature, and a construction which would lead to such repugnant results should not be readily accepted."

14. For being a resident in India, clause (c) of section 6(1) requires that the individual should have been in India for a total of three hundred sixty five days in the preceding four years besides sixty days in the relevant previous year (as may be varied by the Explanation to clause (c) in cases where it applies). Under the second part of clause (a) of sub-section (6) of section 6, during the seven preceding years, if an individual has not for seven hundred thirty or more days been in India, he would qualify for being treated as `not ordinarily resident' in India in the relevant previous year. It would, therefore, be strange to treat a person who has been resident in India in eight years out of ten preceding years as an individual who is `not ordinarily resident' in India. This misconception that has also crept in the commentaries of some learned authors on which reliance was placed, arises, because, one tries to search definition of `ordinarily resident' in India in section 6(6)(a), which as observed above, only lays down the condition of not being resident in India for nine out of ten preceding years for being treated as `not ordinarily resident of India' besides the other condition of not being in India for seven hundred thirty or more days in the preceding seven years. When an individual is not nine years out of ten preceding years a resident of India, it would mean that in none of those nine years, he

was in India for one hundred eighty two days as contemplated by section 6(1)(a). Therefore, even if he was in India, say for 181 days in each of the nine years i.e. 1629 days (or less), he would be residing outside India for 1656 days (or more) in those nine years and would be `not ordinarily resident' in India in the relevant previous year.

14.1 From the condition of not being resident in India in nine out of ten preceding years laid down in sub-section (6) of section 6, it does not automatically follow that for being ordinarily resident in India, one should be resident in India for eight years. A resident in India will be an ordinarily resident in India unless he qualifies to be a `not ordinarily resident in India' under section 6(6)(a). Ordinary residence is the country where a person normally lives or makes habitual visits, as in case of an individual who visits three hundred and sixty five days or more in the preceding four years as contemplated in clause (c) of section 6(1). `Ordinarily resident' for the purposes of income tax connotes residence in a place with some degree of continuity and apart from accidental or temporary absences (See Levene v. Inland Revenue Commissioners [1928] A.C. 217; Union Corporation Ltd. v. Inland Revenue Commissioners [1953] 2 W.L.R. 615). Thus, in Levene v. C.I.R., reported in [1928] A.C. 217, a British subject, who had been ordinarily resident here, returned to this country for periods of between four and five months every year for domestic and other reasons, living in hotels without a permanent place of abode. It was held on the facts that he was resident in this country. A similar decision was given in C.I.R. v. Lysaghat, reported in [1928] A.C. 234, where the facts were not so strongly in favour of the crown; in that case a citizen of the Irish Free State came to English company, and stayed in hotels for a week on the occasion of each visit. The Special Commissioners found as a fact that he was resident in the United Kingdom, and the House of Lords (Viscount Cave L.C. dissenting) refused to interfere with their finding. This case shows that the motive of presence here is immaterial; it is a question of quality which the presence assumes.

15. The foreign income of every resident even when it is not brought into the country is chargeable to tax except when the resident is `not ordinarily resident' in India. For an individual including a resident in order to be `not ordinarily resident' so as to escape tax on his foreign income, it must be shown that the position is covered by clause (a) of sub-section (6) of section 6 of

the Act. When an individual has been a resident in India for nine out of ten preceding years, then in order to escape tax on his foreign income, he must not have been in India for seven hundred thirty days or more in the aggregate during the preceding seven years. The test is one of presence and not absence from India and the length of presence will determine when an individual is `not ordinarily resident' in India. In order that an individual is not an ordinarily resident, he should satisfy one of the two conditions laid down in section 6(6)(a) of the Act, the first condition is that he should not be resident in India in all the nine out of ten years preceding the accounting year and the second condition is that he should not have during the seven years preceding that year, been in India for a total period of seven hundred thirty or more days.

16. The Tribunal has found as a fact that the assessee was a resident in India for eight years out of ten preceding years and his case, therefore, cannot fall under the first part of clause (a) of sub-section (6) of section 6 of the Act. His case will also not fall in the second part of that clause, because, in the seven years preceding the relevant previous year, the assessee had been in India for one thousand four hundred and two days i.e. much more than seven hundred thirty days being the upper limit referred to in that clause.

17. For the above reasons, we are of the opinion that the Tribunal was justified in holding that the status of the assessee for the year in question was not that of "not ordinarily resident" as claimed by him, and that it has not committed any error in interpreting the provisions of section 6(6) of the Act. The question No.1 referred to us is therefore answered in the affirmative in favour of the Revenue and against the assessee and the question No.2 is answered in the negative in favour of the Revenue and against the assessee. The Reference stands disposed of accordingly with no order as to costs.

MAY 3, 2002 [R.K.ABICHANDANI, J.]

[KUNDAN SINGH, J.]

parmar*